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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 434

J. P. HARRIS, PETER MACDONALD, JOHN McCORMALLY, and THE HUTCHINSON PUBLISHING COMPANY, a Corporation,
Respondents,

vs.

JOHN ANDERSON, JR., in His Official Capacity As Governor of Kansas; PAUL R. SHANAHAN, in His Official Capacity As Secretary of State of the State of Kansas; VIOLA PRITCHARD, Commissioner of Elections of Shawnee County, Kansas, and EMOGENE WINEINGER, County Clerk of Greeley County, Kansas, Individually As Such Election Commissioner and County Clerk of Their Respective Counties, and As Representatives of All Election Commissioners and County Clerks of the State of Kansas,
Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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STATEMENT OF THE CASE

This action was brought by respondents, who were the plaintiffs below, against state election and other officials (petitioners) in their representative capacities, challenging certain provisions of the Kansas Constitution which require that each organized county shall have at least one representative regardless of population, as unconstitutional and void and violative of the provisions of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and further challenging as unconstitutional and void the statutory appor-

tionment of the Kansas House of Representatives based thereon. Following *Reynolds* v. *Sims* (1964), 377 U.S. 533, 84 S. Ct. 1362, and related cases, the Kansas Supreme Court rendered judgment for respondents on March 1, 1965 (*Harris* v. *Anderson,* 194 Kan. 302, 400 P.2d 25), wherein it declared invalid and inoperative the offending provisions of the State Constitution, and statutes based thereon, and, thereupon, reserved jurisdiction and allowed the Kansas Legislature the opportunity to enact a valid apportionment statute within a reasonable time prior to April 2, 1966.

Petitioners' motion for rehearing, wherein the points presented in their petition for writ of certiorari were raised before the Court below, was denied by the Kansas Supreme Court on May 10, 1965.

ARGUMENT

The petitioners herein have asserted two questions upon which they request review, their sense and substance being (1) that this Court failed to follow its own rule of constitutional construction in deciding *Reynolds* v. *Sims, supra,* and related cases, through failure to consider and weigh the history of the Fourteenth Amendment and the intention of the various states in their ratification of the same, and (2) that the Fourteenth Amendment was never validly adopted. Respondents submit that these two questions raise nothing upon which this Court's jurisdiction can be invoked.

That petitioners' first question is fallacious and without substance is apparent from the very careful and scholarly dissents of Mr. Justice Harlan in *Reynolds* v. *Sims, supra,* and Mr. Justice Stewart in *Lucas* v. *The Forty-fourth General Assembly* (1964), 377 U.S. 713, 84 S. Ct.

1472. Both of these dissents indicate that exhaustive study of the Fourteenth Amendment and its history had been made, and that the intentions of its authors as well as the ratifying legislatures was both known to and considered by the Court. The majority of this Court having presumably considered such authority to be unpersuasive, the petitioners are not now entitled to seek a review of the rule in the Reynolds case based upon a bare allegation that rules of constitutional construction were not followed.

The second and last point made by petitioners is that the Fourteenth Amendment to the United States Constitution was not validly adopted, that this Court should so determine, and that as a result of an adjudicated invalidity, Reynolds and its sister cases would not be applicable to state legislative apportionment questions. Such a result would raise judicial problems, the mere conjecture of which stagger the imagination! Enormous quantities of our case law and, indeed, a good deal of our every day conduct, is predicated upon and governed by the Fourteenth Amendment and the principles announced therein. What remedy would thereafter be afforded to those denied the equal protection of the laws or due process of law? Fortunately, existing law has already rendered unnecessary the opening of this Pandora's box.

Although the appalling circumstances surrounding the birth and adoption of the Fourteenth Amendment provides a fascinating historical narrative, there is nothing contained therein which provides a basis or authority for this Court to review it. Our governmental records, of which this Court may take judicial notice, indicate that the Secretary of State of the United States issued proclamations declaring the Fourteenth Amendment adopted on July 20, 1868, and again on July 27, 1868. The general law on the subject is set forth at 16 C.J.S. 31, Section 6:

"Congressional legislation has placed with the secretary of state the duty of issuing a proclamation declaring the amendment to be a part of the federal Constitution, on receiving official notice of adoption from three fourths of the several states, and such officer has no discretion to determine the truth of the facts stated in the notice from the states, but with respect to such proclamation merely acts ministerially. Such proclamation is conclusive on the courts, so that the validity of the ratifications cannot be questioned therein."

The very question here raised was squarely dealt with in *Leser* v. *Garnett* (1922), 258 U.S. 130, 42 S. Ct. 217, where the adoption of the Nineteenth Amendment was attacked as invalid in a case arising in the state court system of Maryland. In refuting the right of any court, state or federal, to question such validity, Mr. Justice Brandeis, speaking for the Court, stated as follows at 258 U.S. 138:

"The remaining contention is that the ratifying resolutions of Tennessee and of West Virginia are inoperative, because adopted in violation of the rules of legislative procedure prevailing in the respective states. The question raised may have been rendered immaterial by the fact that since the proclamation the legislatures of two other states—Connecticut and Vermont—have adopted resolutions of ratification. But a broader answer should be given to the contention. The proclamation by the Secretary certified that, from official documents on file in the Department of State, it appeared that the proposed Amendment was ratified by the legislatures of thirty-six states, and that it 'has become valid to all intents and purposes as a part of the Constitution of the United States.' As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts."

It is noted that petitioners are concerned that the Fourteenth Amendment was not properly proposed because the votes of the Senators and Representatives from the eleven former Confederate states who had not then been seated, were not considered in determining whether or not the proposal was adopted by a two thirds vote in each house. It has been held, however, that the two thirds vote in each house which is required in proposing an amendment to the Constitution, is a vote of two thirds of the members present, assuming the presence of a quorum and not a vote of two thirds of the entire membership. *State of Rhode Island* v. *Palmer*, 253 U.S. 350, 40 S. Ct. 486. Petitioners further contended to the Court below that the subsequent ratification was invalid because the ratification of certain states was later withdrawn, and the initial rejection of the former Confederate states was later ignored and by-passed by the subsequent ratification of so-called "Reconstruction" legislatures. It has heretofore been held that (a) a state cannot validly withdraw a ratification once made, but (b) a state legislature which has rejected an amendment proposed by Congress may later reconsider its action and give its approval. *Coleman* v. *Miller* (1937), 146 Kan. 390 at 400, 71 P.2d 518, affirmed 307 U.S. 433, 59 S. Ct. 972. Under any circumstances, however, the proclamation of the Secretary of State is conclusive as to the ratification of the amendment and cannot be questioned by any Court. It is significant in this connection, that in the 97-year history of the Fourteenth Amendment, a history filled with argumentation and litigation, there has never been a successful or serious contention of its invalidity, and that even the most ardent foes of the rule in Reynolds have failed to attack it on these grounds. There is no basis in law for the result petitioners here contend for.

CONCLUSION

As shown by the foregoing argument and law, petitioners seek to certify from the Supreme Court of Kansas no federal question of substance not heretofore determined by this Court, and it is patently obvious that the Court below has not decided this case in a way not in accord with applicable decisions of this Court. Under such circumstances, and in accordance with Rule 19 of this Court, no reason has been shown why this cause should be reviewed herein. The petition for a writ of certiorari to the Supreme Court of the State of Kansas should be denied.

Respectfully submitted,

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